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No. 91-119

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

BRIEF AMICUS CURIAE OF THE MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In attempting to fairly apportion otherwise taxable income from sales of tangible personal property within their boundaries by foreign corporations, how are the "solicitation" and "delivery" requirements in Pub. L. No. 86-272 to be applied by state taxing authorities in the face of conflicting decisions from state courts of last resort as to whether those requirements admit of a *de minimis* exception and as to whether "solicitation" encompasses post-sale activities "incidental" to the canvassing of retail customers.

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BRIEF AMICUS CURIAE OF THE MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Multistate Tax Commission is the administrative arm of the Multistate Tax Compact (the "Compact"). ALL ST. TAX GUIDE ¶701 *et seq.* (Max. Mac. 1991); ST. TAX GUIDE ¶351 (CCH 1991). Nineteen States, including the District of Columbia, have adopted the Compact. In addition, fourteen States are associate members. The Compact seeks to facilitate proper determinations of state and local tax liability of multistate taxpayers, promote uniformity or compatibility of state tax systems, facilitate taxpayer convenience and compliance, and avoid duplicative state taxation. Article I, Compact, ALL ST. TAX GUIDE ¶701 (Max.

Mac. 1991), St. Tax Guide ¶351 (CCH 1991). The Court recognized the validity of the Compact in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The Compact was developed by cooperation among States and taxpayers in response to the findings and recommendations of the Willis Committee. *See* Corrigan, *A Final Review*, 1989 Multistate Tax Comm'n Rev. 1, 1 and 23. Specifically, member States of the Compact are committed to strengthening Our Federalism by resolving the inherent conflict of our federal form of government that presupposes both a single national economy and States with separate taxing authority. The member States of the Commission have accepted the challenge of federalism by developing uniform state tax rules of apportionment and allocation.

In furtherance of uniformity, the Multistate Tax Compact utilizes the Uniform Division of Income for Tax Purposes Act ("UDITPA"), 7A Uniform Laws Annotated 331 (West 1985), as the core rules for the apportionment and allocation of income of a multijurisdictional business. Article IV, Compact, All St. Tax Guide ¶711 (Max. Mac. 1991), St. Tax Guide ¶351 (CCH 1991). The Multistate Tax Commission has further developed regulations interpreting UDITPA. *See* MTC Regs., All St. Tax Guide ¶600 *et seq.* (Max. Mac. 1991). Fostering state tax uniformity through voluntary state cooperation remains central to the Commission.

The Commission's uniformity effort relevant here is its Public Law 86-272 Guidelines, All St. Tax Guide ¶789 (Max. Mac. 1991), St. Tax Guide ¶370a (CCH 1991)

("Guidelines").[1] The Guidelines reflect the Commission's best understanding of congressional intent as expressed in Pub. L. No. 86-272. Consonant with the Commission's understanding of Tenth Amendment jurisprudence,[2] the Guidelines embraced a narrow interpretation of the state tax exemption so that the exemption would apply only in "those limited circumstances clearly and reasonably intended by Congress." App. 4.

The Multistate Tax Commission invited all states to adopt the Guidelines. App. 3. The Wisconsin Tax Appeal Commission accepted the invitation. Pet. for Cert. A-249 - A-253. From the undisputed facts of this case it seems clear that Wrigley's activities would violate several of the thresholds of the Guidelines. The Wisconsin Supreme Court surprisingly forewent application of the Guidelines by adopting an expansive interpretation of the state tax exemption. The Wisconsin Supreme Court's decision is surprising because it occurs in the face of the complaining taxpayer's characterization of Pub. L. No. 86-272 as unclear.[3]

By foregoing the Guidelines, the Wisconsin Supreme Court has unnecessarily frustrated the States' goal of preserving state tax jurisdiction to the maximum extent possible in the face of the requirements of, and the

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[1] The Guidelines as well as the Commission's adopting resolution are reproduced in the Appendix.

[2] *See South Carolina* v. *Baker*, 485 U.S. 505, 510 n.4 (1988).

[3] *See* Pet. Wrigley Br. before the Wisconsin Supreme Court at 14, 16-17. In contrast, Petitioner Wisconsin Department of Revenue argues that Pub. L. No. 86-272 is unambiguous. *See* Arguments I.C. and D. of Pet. for Cert.

policies reflected in, the U.S. Constitution and applicable federal law. The Wisconsin Supreme Court's decision also disconcertingly undermines the uniformity that the Multistate Tax Commission sought. The Wisconsin Supreme Court failed to recognize the opportunity and responsibility that States have to strengthen federalism through voluntary cooperative action.

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court reached its erroneous determination because it failed to apply the Tenth Amendment jurisprudence of the Court and failed to be sensitive to the effect that its decision would have on the operation of all state tax systems. The Tenth Amendment jurisprudence of the Court and sensitivity to multistate taxation counsel that the state tax exemption of Pub. L. No. 86-272 be construed very limitedly to avoid unnecessary intrusion on the traditional state sovereignty. The Wisconsin Department of Revenue must prevail either if the legislative history of Pub. L. No. 86-272 clearly supports the taxing jurisdiction of the States or if the legislative history is unclear. Wrigley may prevail only if there is a *single* clear statement from Congress that supports an expansive state tax exemption.

Wrigley cannot satisfy the plain statement rule standard, because it is clear from the legislative history of Pub. L. No. 86-272 that Congress did not intend to do anything more than to protect mere solicitation as a stopgap, temporary measure. Congress was unwilling to do anything further until it had studied state taxation of

interstate commerce. *See* Title II of Pub. L. No. 86-272. Even if Wrigley is able to cite snippets of legislative history in its favor, such isolated references do not overcome the clear statements of Congress to the contrary.

The most appropriate construction of "solicitation" in Pub. L. No. 86-272 is that it is limited to those activities that directly seek the placement of an order and those collateral activities that are a necessary part of such activities. There is no room within the narrow construction of solicitation to allow activities that indirectly promote the sales business of a seller of tangible personal property in interstate commerce or to ignore activities clearly exceeding solicitation as *de minimis*. The member States of the Commission do not support as their primary position any relaxation of this very restrictive standard. Even the possible use of a pre-sale and post-sale test, as suggested by the State of Iowa, should be viewed as a next-best alternative to the position here stated.

ARGUMENTS

I. THE RELATIONSHIP OF PUB. L. NO. 86-272 TO STATE TAX APPORTIONMENT.

Understanding the relationship of Pub. L. No. 86-272 and the state tax rule for the apportionment of income derived from an interstate business should aid the review of this case. References are given to applicable provisions of the laws of the States of Wisconsin and Illinois (the State in which Wrigley based its operations), as they existed in the 1970's, and UDITPA, which has remained unchanged since its adoption by the National Conference

of Commissioners on Uniform State Laws in 1957.[4] Ill. Rev. Stat. ch. 120, §3-304 (1975); Wis. Stat. §71.07 (1973-1977); UDITPA §1, *et seq*. The basic understanding of the rules of apportionment have not changed substantially.

Income of a business engaged in interstate commerce is attributed to the various States which have contributed to its realization by the use of formula apportionment. Formula apportionment determines the actual apportionment factor that is used to attribute the income of a multijurisdictional business to each taxing State. The form of formula apportionment in most prevalent use among the States is a formula based upon three factors: the property factor, the payroll factor and the sales factor. The specific apportionment factor of each taxing State is determined by averaging the ratios of the in-state component to the everywhere component of the property, payroll, and sales of the business. Ill. Rev. Stat. ch. 120, §3-304(a) (1975); Wis. Stat. §71.07(2) (1973-1977); UDITPA §9. The resulting apportionment factor is then applied to the income of the multistate business to determine how much of the income of the entire business is attributable to and taxable by each taxing State. As is subsequently explained, attribution of business income arising from sales of tangible personal property made in interstate commerce by the use of formula apportionment (which has the potential, depending upon the circumstances,

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[4] Only four States employ income tax statutes that differ widely from UDITPA. Warren, *Principles of Formulary Apportionment*, THE STATE & LOCAL TAX PORTFOLIO SERIES ¶200, ¶205 p. 207 (1989) ("Warren").

either to benefit or to disadvantage a taxpayer) is restricted to companies that are "taxable" in more than a single State.

The basic rules for determining the numerators and denominators of the ratios of the three factors are as follows. The denominators of each factor are equal to the total amount of the respective factors everywhere, *i.e.*, total property, total payroll and total sales. Ill. Rev. Stat. ch. 120, §3-304(a)(1)(A), 2(A), and 3(A) (1975); Wis. Stat. §71.07(2)(a)1., (b)1., and (c)1. (1973-1977); UDITPA §10, 13, and 15. The numerators of each factor are determined by reference to the extent of the presence of each respective factor in the taxing State, whether that State is the base State or another State. Thus, the numerator of the property factor for a State apportioning the income of a multistate business is equal to the amount of property present in that State. Ill. Rev. Stat. ch. 120, §3-304(a)(1)(A) (1975); Wis. Stat. §71.07(2)(a)1. (1973-1977); UDITPA §10. The numerator of the payroll factor is equal to the amount of payroll that is attributed to the taxing State. Ill. Rev. Stat. ch. 120, §3-304(a)(2)(A) (1975); Wis. Stat. §71.07(2)(b)1. (1973-1977); UDITPA §13. Payroll is generally attributable to the taxing State if the employee performs all of his/her services in the taxing State or all, but incidental, services in the taxing State. Ill. Rev. Stat. ch. 120, §3-304(a)(2)(B)(i) and (ii) (1975); Wis. Stat. §71.07(2)(b)4. (1973-1977); UDITPA §14(a) and (b). Special rules apply if the employee performs more than incidental services outside the taxing State. Ill. Rev. Stat. ch. 120, §3-304(a)(2)(B)(iii) (1975); Wis. Stat. §71.07(2)(b)4. (1973-1977); UDITPA §14(c). Sales for purposes of determining the numerator of the sales factor of the taxing

State are sitused on a destination basis, *i.e.*, on a basis of the State to which the goods are shipped. Ill. Rev. Stat. ch. 120, §3-304(a)(3)(B) (1975); Wis. Stat. §71.07(2)(c)2. (1973-1977); UDITPA §16. Unlike the property factor and the payroll factor, the sales factor has a throwback provision. The throwback provision of the sales factor attributes sales that otherwise would be attributed to a State in which the multistate business is not "taxable" to the State from which the goods are shipped. Ill. Rev. Stat. ch. 120, §3-304(a)(3)(B)(ii) (1975); Wis. Stat. §71.07(2)(c)2. (1973-1977); UDITPA §16(b). Taxability for purposes of the sales factor throwback rule is defined in terms of jurisdiction to tax, including consideration of the effect of Pub. L. No. 86-272. *Id.*

As earlier noted, use of formula apportionment to attribute the income of a business engaged in interstate commerce is restricted. Formula apportionment is used only when the multistate business is "taxable" in more than a single State. Ill. Rev. Stat. ch. 120, §3-304(a) (1975); Wis. Stat. §71.07(2) (1973-1977); UDITPA §2. If a business is not taxable in more than a single State, all the income of a multistate business is attributed to the single State in which the business is taxable. Ill. Rev. Stat. ch. 120, §3-304(a) (1975); Wis. Stat. §71.07(1) (1973-1977) (special allocation rules applied); UDITPA §2. A business is deemed taxable in another State when that other State has jurisdiction to impose a tax, regardless of whether the other State does in fact impose an income tax. Ill. Rev. Stat. ch. 120, §3-303(f) (1975); Wis. Stat. §71.07(2) (1973-1977); UDITPA §3. As is the case under the sales throwback rule, Pub. L. No. 86-272 is used to determine the extent to which a multistate business is taxable in

another State in the jurisdictional sense for purposes of determining eligibility to use formula apportionment. Thus, to the extent Pub. L. No. 86-272 bars a State from imposing an income tax, a business will not be treated as being subject to an income tax in the other State.

Because of differing state tax rates and other features of state income taxes, one cannot generalize whether a multistate business will desire to be subject to income tax in more than a single State. To illustrate this point, if a multistate business is based in a State with a high income tax rate, that business may wish to apportion its income out of the base State to another State with a low income tax rate or with no income tax in order to decrease the amount of income that is subject to tax in the base State. Conversely, if the base State has no income tax or a low income tax rate, the business may not wish to apportion its income out of the base State in order to preserve the advantage of this lower tax burden in the base State.

An aggressive taxpayer based in a State with a low income tax rate may still wish to be subject to income tax in at least one other State, however. The reason for desiring taxability in at least one additional State stems from the fact that a taxpayer will thereby be permitted to apportion its income by using the three apportionment factors, property, payroll, and sales, to determine its taxable income in the base State. Because only the sales factor has a throwback provision, a taxpayer *may believe* it can lessen its overall tax burden by being able to attribute some of its income to States in which it has property and payroll but is not subject to tax. *See* Warren, *supra* n.4 at ¶230.6 p. 224. Thus, to the extent a business has payroll

and/or property located in other States in which it is *not* subject to tax, the aggregate of the numerators of the payroll and property factors in the States in which it is subject to tax will be less (and the resulting aggregate state taxable income and state tax will be less). This possibility arises because specific items of property and payroll that are situsedto States not having the jurisdiction to tax are not thrownback to any other State in which the business is subject to tax. This result, if it is obtainable through carefully tax planning, is known as creating "nowhere income," income that is not taxable by any State because of the operation of the apportionment factors. If the multistate business were only taxable in the base State and was not taxable in at least one other State, the business would be ineligible to apportion its income and would be subject to tax on one hundred percent of its income in the base State.

It should be clear from this review that the result obtained from the use of Pub. L. No. 86-272 to determine whether a multistate business is taxable in another State (and hence subject to the use of formula apportionment) is directly affected by whether the state tax exemption of that law is narrowly or expansively construed.[5]

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[5] Litigated cases involving Pub. L. No. 86-272 can illustrate the point. *Compare U.S. Tobacco Co.* v. *Commonwealth*, 478 Pa. 125, 386 A.2d 471, *cert. denied*, 439 U.S. 880 (1978) (taxpayer wins with broad construction), *with Coors Porcelain Co.* v. *State*, 183 Colo. 325, 517 P.2d 838, *cert. denied*, 419 U.S. 874 (1974) (taxpayer loses with broad construction); *compare also Miles Laboratories, Inc.* v. *Dept. of Revenue*, 274 Or. 395, 546 P.2d 1081

(Continued on following page)

Although one cannot generalize about the revenue affect of a narrow or a broad construction of the state tax exemption of Pub. L. No. 86-272, this fact does not make the operation of Pub. L. No. 86-272 potentially any less intrusive upon the state sovereign taxing power. This is plainly apparent from the fact that Pub. L. No. 86-272 has the potential to prohibit the State into which the goods are sold (*i.e.*, the market state) from taxing a multistate enterprise that would otherwise be subject to tax under the Due Process Clause and the Commerce Clause. *See Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). An extreme example illustrates the point: A business based in a single State can sell all of its goods into another State and yet avoid any liability for income tax in the market State if it carefully limits its activities in the market State to mere solicitation. Even if the circumstances of the example are not so extreme, the intrusive nature of Pub. L. No. 86-272 is embodied in the fact that Pub. L. No. 86-272 allows goods to be sold into a market State by a multistate business that will not necessarily be subject to the market State's income tax. The intrusive nature of Pub. L. No. 86-272 is further observed in Argument II.B., *infra*.

(Continued from previous page)

(1976) (taxpayer seeks narrow construction to attribute income to State with no income tax) *with U.S. Tobacco Co.* v. *Martin*, 304 Ark. 119, 801 S.W.2d 256 (1990) (taxpayer loses with narrow construction). It should also be noted that when a taxpayer has a loss, the taxpayer's objectives are likely to be achieved with treatment that is the opposite of what the taxpayer would want if the taxpayer has income.

II. THE DECISION OF THE WISCONSIN SUPREME COURT IS ERRONEOUS, BECAUSE THAT COURT'S CONSTRUCTION OF PUB. L. NO. 86-272 WAS NOT INFORMED BY THE JURISPRUDENCE OF THE TENTH AMENDMENT WHICH REQUIRES CONGRESS TO STATE CLEARLY THE EXTENT TO WHICH STATE TAXATION IS PREEMPTED AND BY THE REQUIREMENTS OF MULTISTATE TAXATION IN OUR FEDERAL SYSTEM THAT INSTRUCT SENSITIVITY TO OTHER STATE TAXING SYSTEMS.

The impression left by the Wisconsin Supreme Court's analysis of Pub. L. No. 86-272 is one of an isolated jurisdiction wrestling with the construction of a statute that could easily have been passed by the State's own legislature instead of a statute passed by Congress that regulates state taxation of interstate commerce in our federal system. Specifically, the Wisconsin Supreme Court's decision in this case is devoid of any consideration of the rule of construction that applies to unclear congressional legislation that preempts fundamental state sovereign powers and of the effect that the construction of Pub. L. No. 86-272 would have on other state tax systems. This erroneous interpretative stance precipitated the Wisconsin Supreme Court's misinterpretation of Pub. L. No. 86-272.

A. The Jurisprudence of the Tenth Amendment Requires Pub. L. No. 86-272 Be Interpreted In A Manner That Is The Least Intrusive On The State Sovereign Taxing Power While Remaining Faithful To The Clearly Expressed Intent Of Congress.

The assumption of this alternative argument is that Pub. L. No. 86-272 cannot be interpreted by the plain

meaning of its statutory language and that resort to the collateral indications of congressional intent is required. Under the Court's Tenth Amendment jurisprudence, this statutory construction environment does not license a state supreme court to surmise congressional intent. Rather, the Wisconsin Supreme Court should have been informed that "Congress had rather limited purposes" in enacting Pub. L. No. 86-272. *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 279 (1972). It should have been apparent that the seven Justices joining in the opinion in *Heublein* endorsed use of the plain statement rule to determine the reach of Pub. L. No. 86-272. *Id.*, 409 U.S. at 281-82. The Wisconsin Supreme Court should have been sensitive to the important "Federal-State balance." *Id.* The Court has reiterated most recently the need for this sensitivity. *Gregory* v. *Ashcroft*, 111 S.Ct. 2395 (1991) (plain statement rule used). *Gregory* for five Justices of the Court establishes a definite analytical framework for construing unclear terms of expressly preemptive law.

Having noted the foregoing, it appears that the plain statement rule can be limitedly applied in this case to the following effect. If the statutory language of Pub. L. No. 86-272 is unclear, as conceded by Wrigley,[6] then the Court should resolve any ambiguity as to congressional intent

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[6] *See* n.3, *supra*.

by adopting the reasonably permitted statutory construction that is the least intrusive. Therefore all that the plain statement rule requires here is that the Court must reverse the Wisconsin Supreme Court unless it is satisfied that (i) Pub. L. No. 86-272 has *only one* plausible congressional intent; and (ii) the *single* plausible congressional intent supports an expansive construction of the state tax exemption. If the legislative history of Pub. L. No. 86-272 additionally evidences a plausible congressional intent that supports a narrow construction of the state tax exemption, the decision of the Wisconsin Supreme Court must be reversed because Congress has not clearly spoken.

Under the plain statement rule, the Wisconsin Supreme Court must be reversed. Reversal is appropriate, because the legislative history of Pub. L. No. 86-272 is affirmatively inconsistent with Wrigley's position. One may conclude, therefore, that reliance on the plain statement rule here need not be very heavy. Yet three Justices of the Court may find even this limited utilization of the plain statement rule unacceptable. The remainder of this Argument responds to these three Justices' expressed objections.

One objection is that the plain statement rule should be used only when the question is whether the statute applies to the States at all (*i.e.*, in this context, whether the statute is intended to preempt the States). *Gregory*, 111 S.Ct. at 2409. That observation, however, did not operate in *Heublein*. It also does not seem to have affected one Justice in another case involving a clearly preemptive statute. *See Exxon Corp.* v. *Hunt*, 475 U.S. 355, 382-83 (1986) (dissenting opinion).

Distinguishing *Heublein* as involving an issue not expressly covered by Pub. L. No. 86-272 (*i.e.*, the absence of statutory language prohibiting inconsistent state alcohol regulation) is without substance. The *Heublein* Court accepted the premise that a State could not circumvent Pub. L. No. 86-272 by imposing doing business requirements that would preclude protection under Pub. L. No. 86-272. 409 U.S. at 282. The *Heublein* Court necessarily determined, therefore, whether liquor regulations were the type explicitly prohibited under this premise. In addition, determination of the preemptive reach of an ambiguous law necessarily resolves whether Congress intended preemption. To the extent that Congress does not clearly state the extent of its preemptive intent, Congress has not expressed preemption. *See* Tribe, AMERICAN CONSTITUTIONAL LAW §6-25 pp. 479-80 (2d ed. 1988).

Another objection voiced is that the rule contravenes *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *South Carolina* v. *Baker*, 485 U.S. 505 (1988). *Gregory*, 111 S.Ct. at 2410. This objection is surprising, because the plain statement rule is a natural corollary to the protection of federalism through the political process. Requiring the political process to speak clearly affords the political process guarantee substance. The power of Congress is not denied, because Congress can always act.

Any other approach transfers the guarantee of federalism through the political process to the *ad hoc* adversarial contentions of litigants of varying skills, resources of time and assets, and litigation strategy adopted to win

the case. The Commerce Clause grants Congress, and not the courts, the power to make fundamental boundary line determinations affecting federalism.[7]

In addition, the Court's use of the presumption against preemption for even expressly preemptive statutes after *Garcia* suggests some flexibility. *See Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 740-41 (1985) (preemption not presumed as to unclear, but expressly preemptive, provision of the Employee Retirement Income Security Act of 1974). *But see Aloha Airlines, Inc.* v. *Director of Taxation of Hawaii*, 464 U.S. 7 (1983).[8]

The final objection is that the assertion that the plain statement rule will confuse the law by unsettling prior cases that have based preemption on something other than express statutory language. *Gregory*, 111 S.Ct. at 2410. This reading of *Gregory* appears to be too expansive. If Congress does speak clearly by these indirect methods,

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[7] Newly enacted 49 U.S.C.A. 1513(f) (West Supp. 1991) well illustrates the need for requiring Congress to speak clearly. Section 1513(f) was adopted in the waning hours of the 101st Congress without any legislative history or prior public exposure. Section 1513(f) raises innumerable construction issues that seriously impact the state taxation of the air carrier industry. *See* Mines, *Congress Disrupts State Taxation of Air Carriers Through Passage of 49 U.S.C. §1513(f)*, 1991 MULTISTATE TAX COMM'N REV. 1.

[8] *Aloha Airlines* interpreted a statute that the Court determined was expressly preemptive of the type of tax in issue from the statute's plain language. *See also Burlington Northern R. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (statutory language "plainly declares the congressional purpose") and *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 370-71 (1986) (plain meaning standard applied to entire statutory scheme).

then the clear statement standard has been met. As so applied, Congress should not be any more burdened.[9]

B. Pub. L. No. 86-272 Should Be Construed With Sensitivity To Its Effect On The Operation of State Taxation of Interstate Business In Our Federal System.

How one state construes Pub. L. No. 86-272 necessarily impacts other States. The interaction suggests a court should note the effect of its decision on other States. This recognition of the principles of multistate taxation of interstate commerce in the decision matrix will further the preservation of federalism. The Court should not be viewed as the sole protector of federalism in the constitutional system. From this perspective there are several matters the Wisconsin Supreme Court should have considered.

The Wisconsin Supreme Court should have noted that the majority of States faced with the issue have interpreted the state tax exemption of Pub. L. No. 86-272 more narrowly. Additionally, the Wisconsin Supreme Court should have considered the uniformity efforts of the Multistate Tax Commission. Consideration of these factors of course would not excuse the Wisconsin Supreme Court from making the correct determination

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[9] In those rare instances where Congress is unable to state definitively the extent of its preemptive intent, it can adopt a statutory policy statement. The policy statement would inform a court as to the limit of the congressional preemptive intent.

but deviating from them would suggest that the decision is on the warning path.

Unfortunately, the Wisconsin Supreme Court was unwilling to analyze the prevailing view seriously, dismissed the Multistate Tax Commission as a "group of state revenue agents," and made no substantial attempt to identify congressional intent. The Wisconsin Supreme Court's reliance on S. Rep. 658, 86th Cong., 1st Sess., was misplaced, because it reported a bill that was different from the enacted legislation. *See* Argument III, *infra*.

The Wisconsin Supreme Court's decision has frustrated state tax uniformity. This departure from uniformity also frustrates Congress, because any congressional law that regulates state taxation *ipso facto* seeks uniformity. Closer examination of the legislative history of Pub. L. No. 86-272 would have reflected an intent not to grant a broad tax state exemption.

As is developed in Argument III, *infra*, the deletion of the sales office exemption of section 101(a)(3) of S. 2524 as reported in S. Rep. 658, *supra*, reflects considerable congressional sensitivity that Pub. L. No. 86-272 not unnecessarily upset market state taxation which can cause unfair competition. The decisions of the Court even during the period it construed state taxing power restrictively under the Commerce Clause display this kind of sensitivity. *See* Lockhart, *The Sales Tax in Interstate Commerce*, 52 HARV. L. REV. 617, 629 (1939); *see also Trinova Corp. v. Michigan Dept. of Treasury*, 111 S.Ct. 818 (1991) (value added in market State). A broad construction of the state tax exemption of Pub. L. No. 86-272 flies in the face of this basic policy.

The Wisconsin Supreme Court should have recognized that a broad construction of the state tax exemption of Pub. L. No. 86-272 increase the potential for no-where income. Among other things, a broad state tax exemption increases the likelihood of having increased activities (including property and payroll) in the market State that are protected by Pub. L. No. 86-272 but not by the Due Process Clause. Apart from having apportionment factors that may be attributed to a State without jurisdiction to tax, some imply there may be an issue whether Pub. L. No. 86-272 may be used by a State having jurisdiction to tax to increase the amount of income apportioned to it. *See* Hartman, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION §9:12 p. 498 (1981). The potential for using Pub. L. No. 86-272 as a tax planning tool was not lost on Wrigley (JA 7-8; T_1: 31) or its counsel. Christopher & Janaszek, *The Scope of Protected Solicitation Under Section 381 After* Wrigley, 10 J. STATE TAX. 47 (1991).

Finally, a court should recognize that any prevailing construction Congress considers wrong can be corrected by that institution. The burden of correction is appropriately placed on business, given the limited purpose Congress had with this stopgap, temporary legislation that seeks to regulate one of the most basic of state sovereign rights.

III. AN INFORMED ANALYSIS OF THE LEGISLATIVE HISTORY SURROUNDING THE DELETION OF THE SALES OFFICE EXEMPTION FROM S. 2524 INESCAPABLY LEADS TO THE CONCLUSION THAT THE STATE TAX EXEMPTION AFFORDED BY PUB. L. NO. 86-272 SHOULD BE NARROWLY CONSTRUED AND WRIGLEY HAS EXCEEDED THE LIMITS OF THIS NARROW EXEMPTION.

The Court has recognized that the breadth of the exemption for activities embraced by the statutory term "solicitation" is narrow. *Heublein*, 409 U.S. at 280, 282 and 283 (mere solicitation). The narrow scope of the protection afforded by the term "solicitation" is well illustrated in more concrete terms by consideration of the legislative history that accompanied the approval of Senator Talmadge's amendment (105 CONG. REC. 16,477 (1959)) that deleted the sales office exemption, section 101(a)(3) of S. 2524 as reported in S. Rep. 658, *supra*.

The sales office exemption as contained in S. 2524 protected not only a sales office maintained by the multistate business but also a sales office maintained by a in-state resident sales representative. When Senator Talmadge's amendment to strike the sales office exemption was under floor consideration in the Senate, 105 CONG. REC. 16,469-16,477 (1959), considerable effort was made to understand the effect of deleting the provision from the enacted law. The overriding consideration in deleting the sales office exemption appears to have been the preservation of market state taxation. 105 CONG. REC. 16,472 (1959) (Exchange between Senators Holland and Talmadge.)

Beyond the concern of preserving market state taxation, the Senate floor debate reflects a clear understanding that deletion of the sales office exemption would severely limit the breadth of the state tax exemption. The following noted statements of participating Senators are telling.

- Senator Talmadge, the sponsor of the amendment, in effect declared that deletion of the sales office exemption would ensure that an out-of-state company with representatives who maintained an office would be taxable. 105 CONG. REC. 16,470-16,472 (1959) (Statements of Senator Talmadge, including the observation that striking section 101(a)(3) from the bill was intended to accomplish exactly what was sought by Senator Sparkman's amendment that would have added language to the bill, 105 CONG. REC. 16,472 (1959).)

- Senator Bennett of Utah indicated that deletion of the sales office exemption of section 101(a)(3) would result in a loss of the tax exemption as soon as the out-of-state business put a sales representative in the taxing State and supplied the representative with the minimum equipment necessary to handle the business. Senator Bennett viewed section 101(a)(2), which was enacted, as permitting a business to have a representative *come in*, and section 101(a)(3) as allowing the business to have a domiciled representative with an office. 105 CONG. REC. 16,361 (1959).

- Senator Saltonstall of Massachusetts, a strong supporter of S. 2524, confirmed these understandings, 105 CONG. REC. 16,471 (1959) (The purpose of section 101(a)(2) is to allow a sales representative to *come into* a State and merely solicit orders.), as did Senator Kerr of Oklahoma, also a strong supporter. 105 CONG. REC.

16,473 (1959) (Section 101(a)(1) and (2) viewed as only allowing salesmen to come in and solicit orders and send them out of state.)

- Most importantly, Senator Byrd, the floor manager of S. 2524, concurred in these restrictive interpretations of S. 2524 following the deletion of the sales office exemption at the critical point when the Senate voted on the amended S. 2524. 105 CONG. REC. 16,493 (bill protects only traveling salesmen who do not have any facilities) and 16,494 (bill only protects a traveling salesman who goes in and sells goods subject to consummation at the home office) (1959).

The House of Representatives appears to have understood that the Senate bill was very limited in scope in its considerations of the conference report after these Senate proceedings had concluded. 105 CONG. REC. 17,770 (Statement of Rep. Celler: mere solicitation), 17,771 (Statement of Rep. Miller: very narrow, indeed) and 17,774 (Statement of Rep. Monagan: mere solicitation) (1959).

It baffles your *Amicus* in the face of this very concrete understanding, how Wrigley can argue for a broad construction of solicitation and for a *de minimis* exception for activities that clearly violate the clarity Congress sought. A mere listing of a few of the activities undertaken by Wrigley in Wisconsin make the point without the necessity of argument.

- The Wrigley representatives were in-state residents.

- At least one of the Wrigley sales managers maintained an in-state office with equipment supplied by Wrigley.

- The Wrigley representatives maintained in-state inventory which they sold and delivered in-state. *See* 105 CONG. REC. 16,355 (1959) (Statement of Senator Byrd to effect that sale of *a* [single] sample would result in the loss of the state tax exemption); section 101(a)(1) of Pub. L. No. 86-272 (delivery from out-of-state required).

- Wrigley rented warehouse space.

- The Wrigley field representatives performed services within Wisconsin by being responsible for the quality of salable inventory of retailers and stocking new stands of gum. *See* 105 CONG. REC. 16,471 (1959) (Statements of Senators Saltonstall and Talmadge to the effect that *services* not covered by S. 2524).

IV. AN APPROPRIATE STANDARD OF SOLICITATION IN LIGHT OF THE INTENT OF CONGRESS TO GRANT A NARROW STATE TAX EXEMPTION BUT STILL OFFER SOME CERTAINTY IS TO LIMIT SOLICITATION TO ACTIVITIES THAT DIRECTLY SEEK PLACEMENT OF AN ORDER OR ARE A NECESSARY PART OF SUCH ACTIVITIES.

The appropriate gloss to place on solicitation in Pub. L. No. 86-272 is suggested not only by its limited scope but also by the need to promote certainty, if possible. Your *Amicus* believes that the standard utilized by the Multistate Tax Commission to develop the Guidelines is the appropriate standard. The Guidelines achieve as much clarity as possible without expansively defining solicitation in violation of the clearly stated intent of Congress. Your *Amicus* suggests the following:

> Solicitation constitutes activities that directly seek the placement of an order and such collateral activities that are a necessary part of that effort. If an activity serves the out-of-state seller beyond the direct attempt to secure the placement of an order, the dual purpose prevents the activity from constituting only solicitation. Solicitation with respect to indirect accounts (so-called missionary activities) is similarly limited with the adjustment being that the test is applied with respect to the seeking of the placement of an order for a customer of the out-of-state seller.

Under the proposed test, Wrigley's broad activities here in issue would not constitute solicitation, because they either were too far removed from a direct seeking of the placement of an order or because they also served a purpose of Wrigley that was separate from the securing of the placement of an order. Three brief observations explain application of the proposed test.

- The sales representatives' replacement and disposition of stale and unsalable gum and stocking of new stands did not constitute solicitation, because neither activity sought the direct placement of an order. In fact, such activities also served Wrigley's independent purpose other than the direct seeking of an order. Specifically, *free* replacement of gum can hardly be viewed as seeking an order. Further, proper disposition of unsalable product rids the marketplace of defective products. Similarly, stocking of a new stand from in-state inventory effected a quick delivery of the product when a new stand was ready to open.

- The sales representatives' assistance on credit problems did not directly seek the placement of a new order. Such activities furthered Wrigley's independent interest in collecting a past due account.

- A collateral activity that is a necessary part of an activity that directly seeks the placement of an order is an activity that must occur in order to engage in solicitation. Thus, protected activities include a sales representative's maintenance of catalogues, samples, and sales literature and the commuting to and from the business being solicited.

The test proposed here by the Multistate Tax Commission is reflected in its Guidelines. Such test is rightfully a restrictive test that is consonant with the clearly expressed intent of Congress. This test is proposed as the most desirable standard to be established for the term "solicitation" under Pub. L. No. 86-272. Even the pre-sale and post-sale test being proposed by the State of Iowa is too expansive and therefore should be viewed as a next best alternative should the Court not be inclined to accept the test proposed.

CONCLUSION

For the foregoing reasons, your *Amicus* respectfully requests that the decision of the Wisconsin Supreme Court be reversed. In reversing the decision of the Wisconsin Supreme Court, the Court should indicate that the state tax exemption of Pub. L. No. 86-272 is to be narrowly construed and that consistent with that limitation the appropriate test of solicitation is whether the activities of the out-of-state company directly seek the placement of an order or are a necessary part thereof.

Respectfully submitted,

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November 21, 1991

APPENDIX

RESOLUTION OF THE MULTISTATE TAX COMMISSION ADOPTING THE PUB. L. NO. 86-272 GUIDELINES

WHEREAS, it is in the interest of effective tax administration for tax administrators from time to time to examine their practices as to their application of nexus standards to out-of-state business organizations with respect to various state taxes; and

WHEREAS, the information regarding such practices, if made generally available to tax administrators, may result in increased uniformity in the states' practices with regard to various nexus issues; and

WHEREAS, the four primary goals of the Multistate Tax Compact are to (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) promote uniformity or compatibility in significant components of tax systems; (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoid duplicative taxation; and

WHEREAS, the state members of the Commission have earlier reviewed their practices with regard to the application of nexus standards relating to sales and use taxation; and

WHEREAS, the state members of the Commission now believe that it is in the best interest of promoting the four primary goals of the Commission to describe generally their practices with regard to Public Law 86-272 and state income taxation; and

WHEREAS, the adoption of a document containing such information describing the states' practices under Public Law 86-272 is one method by which to make generally available such information relating to those practices;

NOW, THEREFORE, the Multistate Tax Commission hereby **RESOLVES** that a document to be entitled "Information Concerning Practices of Multistate Tax Commission States Under Public Law 86-272" be published by the tax administrators of the Multistate Tax Commission states which impose a corporate income tax setting forth information concerning the practices of said states in applying Public Law 86-272 to various factual circumstances; and

BE IT FURTHER RESOLVED, that any member state, if it so desires, may accept, in whole or in part, said document and may otherwise dissent from any statements contained therein, so that said document shall best reflect the present practices of the states in applying Public Law 86-272; and

BE IT FURTHER RESOLVED, that said document be reviewed no less than once every three years by each of the signatory states to confirm that its statement of practice is accurate; and, if not, said state shall amend the document with regard to any such inaccuracy; and

BE IT FURTHER RESOLVED, that it is the intent of this Resolution: (1) that the contemplated document is to be informational only concerning each state's practices in regard to Public Law 86-272 and is not to serve as a basis upon which any person may rely as to a nexus conclusion

with respect to any particular set of factual circumstances; and (2) that that person should inquire of the particular state for information as to that state's position concerning that specific set of factual circumstances.

BE IT FURTHER RESOLVED, that the Uniformity Committee of the Multistate Tax Commission place upon its agenda the issue of whether to promulgate a uniform regulation in this regard to be proposed for adoption by the member states.

Dated this 21st day of June, 1985

Multistate Tax Commission

PUBLIC LAW 86-272 GUIDELINES

[The Multistate Tax Commission has adopted the following guideline for use by its member states in determining whether a corporation has a taxable nexus within a state's borders for income tax purposes. It adopted this guideline under the title "Information Concerning Practices of Multistate Tax Commission States under Public Law 86-272." It invites all states to adopt this guideline.]

Public Law 86-272, 15 U.S.C. 381-384, (hereafter "P.L. 86-272") restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the taxpayer within the state consists of the solicitation of orders for sales of tangible personal property, which orders are to be sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. For the purposes of this document, the term "net income tax" shall also include a franchise tax

measured by net income. If any sales are made into a state which is precluded by P.L. 86-272 from taxing the income of the seller, such sales remain subject to throwback to the appropriate state which does have jurisdiction to impose its net income tax upon the income derived from those sales.

It is the policy of the state signatories hereto to impose their net income tax, subject to legislative limitations, to the fullest extent constitutionally permissible. Therefore, it is also the policy of those states to construe the provisions of P.L. 86-272 narrowly so as to apply that law to only those limited circumstances clearly and reasonably intended by Congress. The following information reflects the signatory states' current practices with regard to: (1) whether a particular factual circumstance is considered either immune or not immune from taxation by reason of P.L. 86-272; and (2) the jurisdictional standards which will apply to sales made in another signatory state for purposes of applying a throwback rule (if applicable) with respect to such sales.

I

NATURE OF PROPERTY BEING SOLD

Only the sale of tangible personal property is afforded immunity under P.L. 86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, intangibles or any other type of property is not immune from taxation by reason of P.L. 86-272. The definition of tangible personal property for this purpose is that to be found under each state's respective laws.

II

SOLICITATION OF ORDERS

For the in-state activity to be immune, it must be limited solely to *solicitation* (except for that activity conducted by independent contractors described in Section III below). If there is any other activity unrelated to solicitation, the immunity shall be lost. Examples of activities presently treated by the signatory states (unless otherwise stated as an exception or addition) as either non-immune or immune are as follows:

A. *Non-Immune Activities*:

The following in-state activities will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance.
2. Collecting delinquent accounts.
3. Investigating credit worthiness.
4. Installation or supervision of installation.
5. Conducting training courses, seminars or lectures.
6. Providing engineering functions.
7. Handling customer complaints.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.
11. Picking up or replacing damaged or returned property.

12. Hiring, training, or supervising personnel.
13. Providing shipping information and coordinating deliveries.
14. Maintaining a sample or display room in excess of two weeks (14 days) during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
16. Owning, leasing, maintaining or otherwise using any of the following facilities or property in-state:
    a. Repair shop.
    b. Parts department.
    c. Purchasing office.
    d. Employment office.
    e. Warehouse.
    f. Meeting place for directors, officers, or employees.
    g. Stock of goods.
    h. Telephone answering service.
    i. Mobile stores, i.e., trucks with driver salesmen.
    j. Real property or fixtures of any kind.
17. Consigning tangible personal property to any person, including an independent contractor.
18. Maintaining, by either an in-state or an out-of-state resident employee, of an office or place of business (in-home or otherwise).

19 Conducting any activity in addition to those described in paragraph II.B. below which is not an integral part of the solicitation of orders.

B. *Immune Activities*:

The following in-state activities will not cause the loss of immunity for otherwise immune sales:

1. Advertising campaigns incidental to missionary activities.
2. Carrying samples only for display or for distribution without charge or other consideration.
3. Owning or furnishing autos to salesmen.
4. Passing inquiries and complaints on to the home office.
5. Incidental and minor advertising, i.e., notice in a newspaper that a salesman will be in town at a certain time.
6. Missionary sales activities.
7. Checking of customers' inventories (for reorder, but not for other purposes).
8. Maintaining a sample or display room for two weeks (14 days) or less during the tax year.
9. Soliciting of sales by an in-state resident employee of the taxpayer; provided the employee maintains no in-state sales office or place of business (in-home or otherwise).

III

INDEPENDENT CONTRACTORS

P.L. 86-272 provides immunity to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the taxpayer directly. Independent contractors may engage in the following limited activities in the state without the taxpayer's loss of immunity:

1. Soliciting sales.
2. Making sales.
3. Maintaining a sales office.

Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as employees.

Maintenance of a stock of goods in the state by the independent contractor under consignment or any other type of arrangement with the principal shall remove the immunity.

IV

MISCELLANEOUS PRACTICES

A. *Interstate Commerce.*

The only activity in the state must be in interstate commerce. If there is any other activity (except that described in II.B. or otherwise incidental to solicitation), then the immunity shall be lost.

Requisites are:

1. Approval of the sales *must* be made outside the state (except for sales by independent contractors).
2. Deliveries *must* be made from a point outside the state.

B. *Incorporated*

The immunity afforded by P.L. 86-272 does not apply to any corporation incorporated within the taxing state.

C. *Service vs. Sale*

Sales of services are not immune under P.L. 86-272. If a sale consists of a mixture of tangible personal property and services, the immunity shall be lost. Examples of such a mixture are:

1. Photographic development.
2. Fabrication of customer's materials.
3. Installation of equipment.
4. Architectural and engineering services.